IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO. 22 OF 1989

Associated Bearing Co.Ltd.,)
Hoechst House, Nariman Point,)
Bombay - 21.) ...Applicant

V/s.

The Commissioner of Income-tax,)
Bombay City-V, Bombay.) ...Respondent

Mr.J.D. Mistry i/b. Crawford Bayley & Co. for Applicant.

Mr.A.N. Kotangale with Mr.Parag Vyas for Respondent.

CORAM : V.C. DAGA AND
A.S. AGUIAR, JJ.

DATED : OCTOBER 7, 2005.

ORAL JUDGMENT (PER A.S. AGUIAR, J.) :-

. The following questions of law arising out of ITA Nos.888, 889 and 890/Bom/82 in R.A.Nos.2162, 2259 & 2260(Bom)/1984 for the Assessment Years 1978-79, 1979-80 and 1980-81, have been referred to this Court under Section 256(1) of the Income-Tax Act by the Income Tax Tribunal :-

1) Whether, on the facts and in the circumstances

of the case, the Tribunal was right in law in directing the I.T.O. to allow investment allowance on calculators for A.Y. 1979-80 and factory cleaning machines for A.Y. 1980-81 ?

2) Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee-company was entitled to claim investment allowance on Rs.1,39,85,955/- at Rs.34,96,489/- for the assessment year 1978-79 and on Rs.1,16,46,083/- at Rs.29,11,521/- for the assessment year 1980-81 which was the actual cost to the assessee as at the date of purchase without taking into account the variations in the liability of the assessee on account of fluctuations in exchange rate and the provisions of sec.43A of the Act ?

3) Whether on the facts and in the circumstances of the case, the Tribunal erred in holding that the investment allowance was not allowable on the

increase in the original cost of imported assets due to increase in the assessee's loan liability consequent to the depreciation in the value of Indian currency in foreign exchange market ?

4) Whether on the facts and in the circumstances of the case, the Tribunal erred in not accepting the claim of the assessee that canteen Equipment and Water Coolers are a part of plant and machinery and that, therefore, the assessee was entitled to investment allowance on the same ?

2. The first issue raised is whether the Tribunal was right in law in allowing investment allowance under Section 32A of the Income Tax Act, 1961, on calculators for the year 1979-80 and factory cleaning machines for the assessment year 1980-81. The Assessing Officer had held that the calculators could by no means be termed as plant and machinery and did not allow depreciation at 100% as claimed by the assessee. The CIT (Appeals) held that in view of the circumstances in which the calculators were used, the assessee was entitled to

investment allowance. The Tribunal upheld the finding of the CIT (Appeals) and noted that calculators are plant and machinery since they are tools of the assessee's trade which in this case was the manufacture of ball bearings.

3. It is well settled that the word 'Plant' must be given a very wide meaning as held by the Supreme Court in **CIT vs. Taj Mahal Hotel 82 ITR 44 (SC)** and that 'plant' includes whatever apparatus is used by a person for carrying on his business. (See **CIT V/s. Elecon Engg.Co.Ltd., 86 ITR 672 (Guj.) and 166 ITR 66 (SC).)** It may be noted that data processing machines, computers, weighing scales & cranes and items of similar nature are held to be plant in **CIT vs. IBM World Trade Corp, 130 ITR 739 (Bom), CIT vs. Emirates Commercial Bank Ltd., 262 ITR 55 (Bom.), and CIT vs. Mahindra Ugine Steel Co. Ltd., 233 ITR 204 (Bom),** respectively. So far as factory cleaning machines are concerned, the Tribunal has upheld the view of the CIT (Appeals) and also noted that the investment allowance had been granted on such items in the earlier years. The Assessment Officer's

order has not discussed this issue.

4. In this view of the matter, the reasons given by the department for not granting investment allowance is clearly erroneous and the Tribunal was right in directing the ITO to allow investment allowance on calculators for the year 1979-80 and factory cleaning machines for the assessment year 1980-81. The said issue is, therefore, answered in the affirmative and in favour of the assessee.

5. The issue raised by question no.4 is whether the Tribunal was right in law in failing to allow investment under Section 32A of the Act on canteen equipment and water coolers having failed to appreciate that these items are also plant and machinery. The Assessing Officer has held that water coolers are in the nature of furniture and fixture as opposed to plant, therefore, cannot be considered as plant and machinery for the purpose of investment allowance. The CIT (Appeals) records that water coolers are a part of the production department for the sustenance of the workers as required

under the factory Act and supplying drinking water to the workers/employees is, therefore, part of the plant and machinery required for its business. It may be further noted that the assessee in the present case is engaged in the activity of manufacturing of ball bearings, taper bearing and textile machinery components. Water cooler supplying drinking water can not be called apparatus, appliance or fittings. No doubt the Tribunal noted that the water cooler is an amenity that the assessee employer has to provide for its workers, however, the Tribunal upheld the view of the CIT that as the water cooler is not directly involved in the manufacturing process of ball bearings, it is not entitled to investment allowance.

6. Learned Advocate Mr.Mistry for the assessee submitted that Section 32A(iii) lays down conditions for grant of investment allowance in respect of new machinery or plant and only requires that the plant be installed in an industrial undertaking for the purpose of business of manufacture or production of an article or thing. The Act no where provides that each item of

the plant should be directly involved in the manufacture or production. It is sufficient that the plant is for the purpose of business and the business must be of manufacture or production of some article. It is further pointed out that various High Courts in the following judgements have held that similar items not actually used in the manufacturing process are plant and entitled to investment allowance. In **CIT vs. Electronics Research Industries Pvt.Ltd. 192 ITR 20 (Kar) (Internal Telephone System), in CIT vs. Mahant Oil Industries Pvt.Ltd. 193 ITR 620 (Kar) (a storage tank), in CIT vs. Jokai India Ltd., 251 ITR 39 (Cal) (trailers for transport of tea leaves), in Mehsana Dist.Co-op.Milk Producers Union Ltd. vs. CIT, 256 ITR 322 (Guj.) (wireless equipment), in the case of CIT vs. Tube Investments of India Ltd., 261 ITR 753 (Mad.) (ground water tank) and in Tribeni Tissues Ltd. vs. CIT (Cal.), 190 ITR 487 (tubewell and weighing machine)** were held to be plant entitled to investment allowance.

7. The reasoning of the department for not granting investment allowance is clearly erroneous and issue no.4

must, therefore, be answered in the affirmative in favour of the assessee and against the revenue.

8. Question No.3 raises the issue whether investment allowance can not be allowed on increase in the original cost of the imported assets on account of increase in the assessee's loan liability consequent upon depreciation in the value of the Indian currency in the foreign exchange market. The Tribunal has held that the investment allowance should be based on the cost as on the date of purchase. The Tribunal was of the opinion that the most natural way to determine the cost is with reference to exchange rate at the time of purchase and in support thereof, the Tribunal has relied upon the decision of the **Calcutta High Court** in the case of **Calcutta Electricity Supply Company Ltd., 136 ITR 777.** In the said case, the assessee, a non-resident company maintained accounts in pound sterling and computed the value and depreciation in terms of sterling only. On account of devaluation of Indian rupee on 6.6.1966, such a computation gave the assessee a larger depreciation than what was allowable had the computation

been in Indian currency. The CIT by its order under Section 263 reduced the depreciation allowable. On a reference, the **Calcutta High Court** held as follows :-

> "Assessment under the I.T.Act, 1961, must always be made in Indian rupees according to the Indian Income-tax Act. The Act contemplates a determination of every allowance and every item of income in terms of Indian currency. Therefore, the words 'written down value' and the actual cost to the assessee" in sec.43(6) contemplates cost of assets in rupees and not any other currency. Depreciation is a kind of loss suffered by the assessee. The loss is determined in terms of money by applying the prescribed percentage on the written down value of the assets in accordance with r.5 of the I.T.Rules, 1962."

9. Referring to the said decision, the Tribunal observed that the value of the fixed assets required in any particular currency can be converted into different

currency only at the rate of exchange which prevail at the time of purchase. The Tribunal also referred to **Karnataka High Court** ruling in the case of **Kirloskar Electric Co.Ltd., 115 ITR 907.** In that case, the assessee company had deposited sterling in the foreign branch of Indian Bank for purchase of machinery. Revaluation took place consequent to the deposit and before the purchase and question was for determination of the actual cost of the machinery. The High Court held that the actual cost be fixed by applying the exchange rate at the time of purchase.

10. It is the contention of Mr.Mistry, learned Advocate for the assessee that the question raised has to be answered taking into account the purport and meaning of "actual cost" as defined in Section 43(1) of the Act for the purpose of Sections 28 to 41 of the Act. It is submitted that in a case where the assessee has acquired assets by incurring liability which were to be discharged in foreign currency, the cost of the assets to the assessee would change depending upon the rate of foreign exchange on the date the liability was repaid.

It is appreciated that the Revenue may contend that all allowances based on costs such as depreciation and investment allowance should be based on the figure of cost arrived at by translating the outstanding foreign currency liability into Indian rupees on the date the assets was acquired. Such a contention would result in an assessee being granted incentives/allowances based on figures which do not reflect the real cost incurred by him. It is precisely to meet such contention by the revenue that the legislature had inserted Section 43A in the said Act.

11. Section 43A provides that in the circumstances set out the amount by which the liability is increased or reduced by a change in the rate of exchange at any time after the acquisition of the assets shall be added or deducted from the actual cost of the assets as defined in Section 43(1). In drafting the provision in this manner, the section automatically applied to all allowances based on actual cost as defined in Section 43(1) of the Act. It is pointed out that there was therefore no need to specify all the allowances

individually and no such specification of allowances has been made. For example, even depreciation granted under Section 33(2) has not individually been mentioned. This view is supported by the fact that where the legislature intended to exclude the allowance based on actual costs such as development rebate under Section 33, a specific exclusion had to be made by Section 43A(2). In contradistinction, Section 43A(1) mentions other allowances intended to be varied which were not based on actual cost such as Section 35(1)(iv), 35A, 36(1)(ix) or for the purposes of Section 48. It is pointed out that it was necessary to individually mention these allowances only because they were not automatically varied since they were not based on actual cost as defined under Section 43(1).

12. It is submitted that Section 43A(1) commences with a non-obstinate clause which overrides all the other provisions of the Act and must therefore, be given full and proper effect to by interalia altering actual cost for the purposes of Section 32A as well. If the legislature had intended that Section 43A(1) was not to

apply to Section 32A, when introducing Section 32A it would have introduced a non-obstinate clause or added to the exclusions in Section 43A(2). It is submitted that there is nothing to suggest that Section 43A is not to apply to Section 32A and in fact every canon of interpretation demands that Section 43A is applicable to Section 32A. **(CIT vs. GSFC Ltd. 259 ITR 526 (Guj.)(FB)).**

13. The only argument of the Revenue is that investment allowance under Section 32A is a one time allowance which had been allowed in the earlier year and therefore, no further investment allowance can be granted by applying Section 43A. The Revenue's stand is clearly untenable as had the legislature intended to exclude one time allowances, Section 43A(2) would become redundant. Further, the legislature has expressly referred to the one time allowance in Section 43A(1) itself such as Section 35(1)(iv), 35A etc. There is, therefore, nothing to suggest that one time allowances are to be excluded. In fact, there are several reasons to show that one time allowances are to be included.

For instance, Section 32A itself provides that investment allowance may be availed of during the period of eight years **(CIT V/s. GSFC (Supra).**

14. Section 43A(1) in express terms applies whenever there is an increase or decrease in liability due to a change in the rate of exchange at any time after the acquisition of the asset. The section expressly provides that such variation during the previous year shall be added to or reduced from interalia the actual cost. **(CIT V/s. GSFC Ltd. (supra).** In fact it is suggested that Section 43A could apply as a result of variation in the rate of exchange at any time and not merely during the eight years within which investment allowance must be availed of.

15. Section 43A is a beneficial provision which should be liberally construed so as to further its object and should be given full effect to. The interpretation suggested by the department would nullify its object and render the same otiose. The depreciation under Section 32 is also based upon actual cost as

defined under Section 43(1) of the Act and the department has accepted in this very case that the depreciation can be varied by applying Section 43A(1). There is no reason why Section 43A(1) should be applied to vary depreciation but not investment allowance **(CIT vs. Baker Mercer India Pvt.Ltd., 196 ITR 667 (Bom), Padamjee Pulp & Paper Mills Ltd. vs. CIT 210 ITR 97 (Bom), CIT vs. Motor Industries Co.Ltd. 173 ITR 374 (Kar) and CIT vs. Widia India Ltd. 193 ITR 475 (Kar).**

16. The decision of the Bombay High Court in **Khatau Makanji Spinning & Weaving Co.Ltd. vs. CIT, 222 ITR 472** referred by the Revenue can be distinguished since there was no consideration of the issues arising and the said judgments sets out no reason whatsoever for arriving at its conclusion. Further, the latest decision of the Supreme Court in **CIT Gujarat vs.Shri Ambika Mills Ltd., 201 ITR 63(SC)(St.),** wherein the Supreme Court approved the Gujarat High Court's view on the merits of that case supersedes decision of the Bombay High Court in **Khatau Makanji's case (cited supra)**. The said decision in **Khatau Makanji's case**

(cited supra) being a Judgment per incuriam, **CIT vs. Modu Timblo (Individual), 206 ITR 647, Yanga 1944 (2) ITR 293** and passed sub-sillentio and being inconsistent with the earlier decisions of this Court and of the Supreme Court is erroneous and cannot be used by the Revenue to deprive the assessee of the benefit of investment allowance on the increased loan liability consequent upon the depreciation of the Indian currency in the foreign exchange market.

17. In the light of the above discussion, it must be held that the Revenue erred in holding that the said investment allowance was not available in respect of the enhanced liability due to the fluctuation in the foreign exchange market. The issue must accordingly be answered in the affirmative in favour of the assessee and against the revenue.

18. In view of the finding on Issue No.3 above, Issue no.2 which is akin to Issue No.3, is also answered in negative, in favour of the assessee and against the revenue.

. The reference accordingly stands disposed of with no order as to costs.

(A.S. AGUIAR, J.) **(V.C. DAGA, J.)**